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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ALAN LYNN HOLLER, JR., Defendant and Appellant.	G041443 (Super. Ct. No. 08CF0423) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Hoffer, Judge. Affirmed.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf, Heather F. Crawford and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

After defendant Alan Lynne Holler pleaded guilty to committing six counts of lewd acts upon a child under the age of 14 years (Pen. Code, § 288, subd. (a); all further statutory references are to this code; counts 5-10), a jury convicted him of two counts of aggravated sexual assault (forcible rape) on a child (§ 269, subd. (a)(1); counts 1 & 3) and two counts of forcible lewd acts upon a child under age 14 (§ 288, subd. (b)(1); counts 2 & 4). The court sentenced him to 33 years in prison, consisting of three years on count 5 and two consecutive 15-years to-life terms on counts 1 and 3. Sentence on counts 2 and 4 were stayed under section 654 and concurrent 3-year terms imposed on counts 6 through 10.

Defendant concedes he molested the child, his minor daughter, but contends there was insufficient evidence "these molestations were aggravated or forcible" to support the jury verdicts on counts 1 through 4 and that the prosecution's failure to provide him a study referenced by an expert deprived him of due process. We find no error and affirm.

FACTS

Defendant visited the victim and her younger brother about twice a year from about 2002 to 2006. During each visit except for one, he sexually abused the victim, sometimes kissing or touching her or licking her vagina, and on every occasion placing his penis inside her vagina. Each time, she tried "to make it stop or not happen." She would "try[] to move away from him [but] he wouldn't let [her and] would hold [her] still. He just stopped [her] whenever he wanted to." This describes each incident where defendant put his penis in her vagina. Defendant held her each time to keep her from getting away. His acts upset, hurt, and scared the victim.

The jury convictions involve two incidents. The first one occurred when the victim was about 7 years old (counts 3 and 4). The victim and her brother were in a bunk bed. Her brother was in the top bunk and she was on the bottom bed with defendant. Defendant took off the bottom half of the victim's clothes, including her panties. The victim felt she could not stop him because he was her father and was bigger than her. Then after taking off his own clothes below the waist, defendant placed his penis into the victim's vagina and moved it, which scared her and hurt her physically. Defendant told her not to tell anyone. Her brother heard the victim crying and yelling and defendant telling her to be quiet.

The second incident happened when the victim was 8 years old (counts 1 and 2). She was in the bathroom when defendant entered and closed the door. After removing her clothes and making her lie on the floor, neither of which she agreed to, and removing his own pants, defendant got on top of her and held her down so she could not move. Although she tried to move away, he held her still. He touched her vagina with his hands and tried to forcibly kiss her. When she tried to keep her mouth closed, he held it open and shoved his tongue inside. He then placed his penis inside her vagina, which hurt her. The victim was crying and told him it hurt but he ignored her.

DISCUSSION

1. Sufficiency of the Evidence

a. Counts 1 and 3

In counts 1 and 3, the jury found defendant guilty of aggravated sexual assault (forcible rape) of a child, which requires proof the crimes were accomplished

against the victim's "will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (§§ 269, subd. (a)(1) & 261, subd. (a)(2).) Defendant argues none of these were established. We disagree. There was substantial evidence of force.

When determining whether substantial evidence supports the finding that a defendant used force, "'the reviewing court . . . looks to the circumstances of the case, including the presence of verbal or nonverbal threats, or the kind of force that might reasonably induce fear in the mind of the victim, to ascertain sufficiency of the evidence of a conviction [of forcible rape].' [Citation.]" (*People v. Griffin* (2004) 33 Cal.4th 1018, 1028.)

"In *People v. Griffin* . . ., the Supreme Court addressed the question whether 'force' for purposes of our forcible rape statute must be shown to be '"*substantially* different from or *substantially* greater than" the physical force normally inherent in an act of consensual sexual intercourse.' [Citation.] The court rejected the need for such proof: 'To the contrary, it has long been recognized that "in order to establish force within the meaning of section 261, [former] subdivision (2), the prosecution need only show the defendant used physical force of a degree sufficient to support a finding that the act of sexual intercourse was against the will of the [victim]."' [Citation.] Thus, according to *Griffin*, the force requirement for purposes of section 261, subdivision (a)(2) has no special meaning outside the commonly understood definition of 'force.' Though the statute does require proof of both force (or one of the other statutory aggravators) and lack of consent, force '"plays merely a supporting evidentiary role, as necessary only to insure an act of intercourse has been undertaken against a victim's will."' [Citation.] Thus, 'even conduct which might normally attend sexual intercourse, when engaged in with force sufficient to overcome the victim's will, can support a

forcible rape conviction.' [Citation.]" (*In re Jose P.* (2005) 131 Cal.App.4th 110, 115-116, fn. omitted.) "This level of force also applies for convictions of aggravated sexual assault of a child by rape . . . [citation]. [Citation.]" (*In re Asencio* (2008) 166 Cal.App.4th 1195, 1200.)

Defendant acknowledges that sufficient evidence of force can be found where the victim attempts to pull away but is unable to because the defendant is on top of her. (See *In re Jose P., supra*, 131 Cal.App.4th 110, 117.) But he asserts "there was no evidence [the victim] tried to pull away." He is mistaken. During every molestation defendant removed the victim's clothes and laid on top of her, pinning her down and when she tried to move away, he held her to prevent her from escaping. The victim cried and yelled and told defendant he was hurting her but he ignored her. This was sufficient evidence of force. (See *People v. Griffin, supra,* 33 Cal.4th at 1029 [adult defendant pinning minor's arms to floor while penetrating her vagina with his penis showed the defendant "used force . . . to accomplish intercourse against [victim's] will"]; *In re Jose P., supra,* 131 Cal.App.4th at p. 117 [force inherent in penetration sufficient to show forcible rape where victim rebuffed efforts to engage in intercourse and made it clear she did not want to be penetrated and that the defendant's efforts were "against her will and physically painful"].)

We reject defendant's attempt to distinguish *Griffin* on the basis that the victim's arms in that case were "pinned to the floor," which showed "[t]here was clear physical force used," whereas here, the victim's "arms were not pinned to the floor[and] [s]he . . . was unable to move simply because her father was on top of her while trying to have intercourse with her." This ignores the evidence defendant similarly held the victim down and prevented her from leaving when she tried to move away. It also fails to consider the victim's crying and yelling and the physical pain he caused her, from which a reasonable jury could find defendant engaged in intercourse against the victim's will.

People v. Kusumoto (1985) 169 Cal.App.3d 487, cited by defendant, is inapposite. First, the issue decided involved "how to treat the rape-by-object of an unconscious victim." (*Id*. at p. 494, fn. omitted.) The victim in this case was fully awake when her father penetrated her with his penis against her will. Second, *Kusumoto* placed great weight on the holding in *People v. Cicero* (1984) 157 Cal.App.3d 465, 474 that the force used in lewd acts on a child must be "substantially different from or substantially greater than that necessary to accomplish the lewd act itself." (*People v. Kusumoto, supra,* 169 Cal.App.3d at p. 494.) But *Griffin* disapproved applying that standard to forcible rape cases. (*People v. Griffin, supra,* 33 Cal.4th at pp. 1018-1019, as applied to forcible rape cases. (§ 261, subd. (a)(2).)

b. Counts 2 and 4

In counts 2 and 4, alternative charges to counts 1 and 3, defendant was convicted of forcibly committing lewd and lascivious acts upon the victim. (§ 288, subd. (b)(1).) Defendant contends substantial evidence does not support the finding that he committed the offenses with "force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person" as required by the statute. The argument lacks merit. Substantial evidence of force exists.

"To convict for committing a forcible lewd act against a child in violation of section 288, subdivision (b), the prosecution must prove that the defendant used physical force . . . substantially greater than that necessary to accomplish the lewd act itself. [Citation.]" (*In re Asencio, supra*, 166 Cal.App.4th at p. 1200, fn. omitted.) In *People v. Bolander* (1994) 23 Cal.App.4th 155, the court explained that the force requirement in section 288, subdivision (b) "is intended as a requirement that the lewd act be undertaken without the consent of the victim. [Citation.]" (*Id*. at p. 161.) *Bolander* held the "defendant's acts of overcoming the victim's resistance to having his pants

pulled down, bending the victim over, and pulling the victim's waist towards him constitute force within the meaning of subdivision (b) 'in that defendant applied force in order to accomplish the lewd act[] without the victim's consent.' [Citation.]" (*Ibid.*)

Here, as the Attorney General notes, defendant's "lewd acts in the bathroom . . . included not only kissing [the victim], but forcing her mouth open to insert his tongue . . . , and not only touching her vagina with his hands but holding her down to do so . . . . Likewise, . . . [defendant's] admitted rubbing of his penis against [the victim's] vagina while lying on top of her constituted a greater degree of force than that necessary to accomplish a lewd touching." Defendant also removed all her clothing and held her down when she tried to get away. A defendant may fondle a child's genitals without taking off all her clothes, pinning her against the ground, or otherwise restraining her movement. Such force is different from and in excess of the type of force used to accomplish similar lewd acts with a victim's consent.

2. Discovery Violation

The prosecution's expert witness testified medical providers generally cannot tell whether a female's vagina has been penetrated by merely performing an examination. Additionally where, as here, the subject is examined more than five days after the alleged abuse, in only a small percentage of the cases would the injury heal in a way that would demonstrate sexual abuse occurred. The expert had personally examined pregnant teenagers, as well as a pregnant 10-year-old child, all of whom had normal genital examinations notwithstanding obvious sexual activity. She also referenced a study in which 37 pregnant teenagers were examined and only 2 had abnormal genital examinations.

Defendant objected to the study on discovery grounds and during a sidebar claimed he had specifically requested "all expert materials like that." The prosecutor did

not remember such a request, noting they had "been a little loose in our exchange of experts." He stated he was familiar with the study from another trial and that it was commonly used in such cases, with which the court agreed. Nevertheless, he did not know his expert would be referencing the study until he spoke with her that morning. Defense counsel could not provide any statutory authority requiring the prosecution to turn over all studies an expert might reference while testifying, but stated, "As a matter of due process, they have to provide what they're going to be relying on." The court overruled the objection. Defendant contends this was error. We are not persuaded.

"The prosecution has a duty under the Fourteenth Amendment's due process clause to disclose evidence to a criminal defendant when the evidence is both favorable to the defendant and material on either guilt or punishment. [Citations.] 'Evidence is "favorable" if it . . . helps the defendant or hurts the prosecution, as by impeaching one of [the prosecution's] witnesses.' [Citation.] 'Evidence is "material" "only if there is a reasonable probability that, had [it] been disclosed to the defense, the result . . . would have been different."' [Citations.] Such a probability exists when the undisclosed evidence reasonably could be taken to put the whole case in such a different light as to undermine confidence in the verdict. [Citations.]" (*In re Miranda* (2008) 43 Cal.4th 541, 575.) Defendant makes no showing the study was either favorable or material to his guilt or punishment, merely claiming instead that the study was not timely turned over or identified. As a result, there was no due process violation.

Defendant mentions section 1054.1 as "requir[ing] discovery of 'any exculpatory evidence.'" But he offers no reasoned argument or authority as to how the study was exculpatory, thereby forfeiting any claim in this regard. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.